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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 49

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION, AND
HAZELTINE CORPORATION, A CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER ZENITH RADIO CORPORATION TO HAZELTINE RESEARCH, INC. REPLY BRIEF.

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Under the guise of correcting Zenith's "misstatements" of the record, Hazeltine has filed a further brief denominated a "Reply". The brief is nothing but an attempt to have the last word and is essentially a reargument of matters argued at length in Hazeltine's answering brief. We confine ourselves to responding to the alleged misstatements.

1. Hazeltine challenges the accuracy of the following statement in Zenith's reply brief: "The testimony was undenied that because of the activity of the pool [after the

Zenith-RCA settlement] Zenith could not obtain any distributors except in Western Canada (A. 456)." Not only is this statement supported by the record reference given but also by Wright's testimony two pages later in the record where in referring to continuing pool interference and the pool's "Warning Notice" of September, 1958, he testified: "Here is a threat by an apparently respectable organization which is composed of companies like Canadian General Electric and the Telephone Company in Canada and Westinghouse, Phillips, the Marconi group [that] everyone that handles our product from the user on up to the distributor is going to be sued. *This has a serious effect on your ability to get the kind of distributors that you would need to do the kind of marketing job that we have been talking about, to be able to make the kind of investment and do the promotion and the advertising and to build a sales force that will do it*" (A. 458). See also Wright's testimony at A. 450-3, 461, 472-3.

In an attempt to discredit this testimony Hazeltine again resorts to rejected post trial offers of proof of Zenith annual reports. Respondent apparently contends that because Zenith did not complain of pool interference in these reports, this circumstance somehow impeaches the evidence on that subject introduced at the trial. The trial judge certainly was not impressed with this contention, observing, "I know of no requirement that you cry on your stockholders' shoulders" (Ct. of Appeals Appendix, A. 1905). The omission of such self serving statements in Zenith's annual reports obviously has no significance.

2. Hazeltine next charges that Zenith's acknowledgement of the existence of government import restrictions in England and Australia prior to the damage period, constitutes an admission "that its original contention and findings that the pools prevented it from building a market in England and Australia were untrue". Nothing could be

further from the fact. The record shows that Zenith sought to enter these markets since as early as the 1930's but the pooling agreements were then already in effect and continued at all times down to the date of trial. They were never abandoned by the pool members as an unnecessary restraint on importation during the 1946-1959 period when government restrictions were in effect. The Trial Court so found and these findings were not disturbed as a result of the embargo hearing (See Findings XVI, A. 2900, XXXIV, A. 2907). The Trial Court after the embargo hearing reiterated his finding as to the exclusionary nature of the pools, stating, "there could be no question in my mind that Zenith suffered damages during the damage period by virtue of the pools which I have found, and reiterate existed at the time of the damage period." (A. 3524). The Court, however, concluded that because of the double barrier of governmental embargoes in the pre-damage period, Zenith could not have obtained the share of the English and Australian markets testified to by Wright and Kaplan "starting from scratch" and, accordingly, reduced the damage amounts (A. 3525).

While Zenith conceded the existence of government import licensing restrictions in England and Australia, it introduced evidence during the embargo hearing to show that these restrictions did not constitute an absolute prohibition or embargo on imports and that importation remained possible on a commercial scale. See *Timken Roller Bearing Co. v. United States,* 341 U. S. 593, 599 (1950). The District Court, however, decided otherwise and no appeal was taken by Zenith from this ruling. The fact that the pool agreements restricting imports were continued and renewed during the so-called embargo period indicates that the pool members and their co-conspirators were not satisfied to rely only on government licensing policy which could and did change.

3. Hazeltine claims Zenith has misconstrued this Court's decision in *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968). It is Hazeltine's contention that Zenith not only released any claim for damages caused by pool activity before September, 1957 (the RCA-Zenith settlement date) but also is barred in this suit from showing the "continuing and accumulating" effects of such pool activities to block imports on Zenith's business in 1959-1963. A similar contention was rejected in *Hanover Shoe*. There it was urged that because United's lease-only policy was initiated in 1912, Hanover was therefore barred by limitations from seeking damages in 1955 based on this *same* lease-only policy. This Court said: "[W]e are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury that United inflicted, it was equally entitled to sue in 1955." Similarly, here, although Zenith could and did sue for damages in an earlier period, it was equally entitled to sue in 1963 for damages during the period 1959-1963 resulting from the pool's continuing policy not to license imports. See also *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 327-8 (1954).

Wright testified that Zenith was unable to obtain adequate distribution and properly develop the Canadian market because of the continuing threat posed by the pool and the fact that Zenith's sets were unlicensed (A. 450-3, 456-8, 461, 472-3). This testimony related specifically to the period *after* the RCA-Zenith settlement in 1957. For thirty years the pool had conditioned the Canadian market against handling imported sets. Distributors and buyers of imported sets were warned by the pool that they would be sued for infringement; and they were sued! (DX 130-138, A. 1861-82; DX 143-44, A. 1968-77). Publication of the pool's "Warning Notice" in 1958, after the settlement, was

notice to all that the pool's policy against imports remained unchanged. This notice, as Wright testified, had the effect of reasserting all the illegal conduct which preceded the settlement with "cumulative harm".

Moreover, the release on which Hazeltine relies was raised for the first time *after* trial by offer of proof and *after* the District Court had entered findings in favor of Zenith (A. 2956-59, 3036-7, 3040, 3048, 3049-52). During the trial Hazeltine's then counsel, Dodds, took the position that Zenith was seeking and could only recover damages because of pool activity subsequent to the start of the damage period in June, 1959 (Court of Appeals Appendix, Z. A. 347-8, 390). He never contended that some part of the ten million settlement represented damages sought in the instant case and no evidence to this effect was offered by Hazeltine during the trial (or by offer of proof after trial) although this would have been its affirmative burden had the defense been pleaded.

However, after findings had been entered, Hazeltine's new counsel urged that Hazeltine had been misled as to Zenith's theory of the case and that but for this fact the defense of release would have been pleaded (A. 2996-7, 3036-7). The District Court expressly rejected this claim of surprise when he denied Hazeltine's motions to dismiss the counterclaim and to reopen the case for further proofs as to Canada (A. 3037-9). At the time the Court observed (Court of Appeals Appendix, A. 1865):

> "I think that the pretrial briefs show that he wasn't suddenly confronted with this, because the pretrial briefs filed many months before trial indicated to Mr. Dodds what the theory of the cross-complaint was".

In entertaining Hazeltine's motion for leave to file the defense of release (A. 3036-7, 3040) the District Court indicated that it was not reopening the case on this issue but was only permitting Hazeltine to show that this defense

was tendered on April 1, 1965 "after proofs are closed and after findings have been made" (A. 3037). As in the case of offers of proof, Hazeltine was permitted to file whatever it wanted to file "for the sake of the record" (A. 3036) but the Court in the exercise of its discretion expressly declined to reopen the case except on the limited embargo issue in England and Australia (A. 3037-9).[1]

4. Hazeltine next asserts that because paragraph 13 of Zenith's answer to the patent infringement claim was stricken these allegations were not proved, contrary to our representation. Hazeltine, not Zenith, is misstating the record. Hazeltine neglects to point out that paragraph 13 of the answer which related to Hazeltine's alleged misuse of patents because of its patent pool activities, as well as paragraph 12 of the answer which related to Hazeltine's alleged misuse of patents because of its domestic package licensing activities, were realleged and incorporated in paragraph 4 of the counterclaim (A. 65). Paragraph 13, *inter alia,* alleged that Hazeltine and its co-conspirators had employed their inventions, including the alleged invention covered by the patent in suit and the inventions covered by the package license described in paragraph 12, "*both in the United States and abroad,* for the purpose and with the effect of restraining and preventing defendant . . . from engaging in foreign commerce" (A. 18-19). The issues raised by paragraphs 12 and 13 of the answer, as incorporated in paragraph 4 of the counterclaim were, as represented, determined in Zenith's favor (A. 2857, 2910, 2911).

5. Finally, Hazeltine takes issue with our statement that it receives a million dollars a year from illegal patent

1. Zenith does not concede that Hazeltine would be entitled to the benefit of the RCA release even if pleaded as a defense. Hazeltine was neither a party nor named as a co-conspirator in the Zenith-RCA case and is not mentioned in the releases. See Zenith reply to government brief.

pool activities. It counters with the unsworn statement of its present counsel that receipts from the Canadian, English and Australian pools did not exceed $150,000 a year during the damage period. However, in answers to interrogatories it was admitted that counterparts of Hazeltine's domestic patents were not only in these pools, but in patent pools in Finland, Norway, Sweden, Austria, Belgium, France, Hungary and Switzerland as well (A. 22; DX 32, A. 1128). As part of the consideration for putting its patents in foreign pools Hazeltine received cross licenses under the United States patents of its foreign co-conspirators. These patents were included in Hazeltine's domestic package licenses from which it derived royalty income (A. 1156-7). According to Hazeltine's own report it received total royalty income "from all sources, both within and outside the United States" of $1,084,000 in 1960. During the eleven-year period between 1950 and 1960 royalty income totalled $18,361,000, or an average of $1,669,181 per year (DX 32, A. 1130). We submit that the foregoing completely substantiates our statement.

Respectfully submitted,

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